

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

# GARY LAMBERT

## Claimant

VS.

**ES WILSON TRANSPORT, INC.**

Respondent

AND

**AMERICAN INTERSTATE INSURANCE CO.**

Insurance Carrier

Docket No. 1,054,950

## ORDER

Respondent and its insurance carrier appealed the March 11, 2013, Award entered by Administrative Law Judge (ALJ) Rebecca A. Sanders. The Board heard oral argument on June 21, 2013, in Wichita, Kansas.

## APPEARANCES

Gary K. Albin of Wichita, Kansas, appeared for claimant. Terry J. Torline of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

## RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument the parties agreed they were not appealing the ALJ's findings that: (1) claimant received an overpayment of temporary total disability payments from May 13, 2011, through May 16, 2011, and (2) claimant has a 16% whole body functional impairment. Respondent also withdrew its request that claimant should be ordered to pay court reporter fees for depositions and hearings scheduled by claimant, including Dr. Murati's deposition.

## ISSUES

This is a claim for a February 12, 2011, accident. ALJ Sanders: (1) awarded claimant benefits for a 16% whole body functional impairment; (2) found there was an overpayment of temporary total disability benefits; (3) ordered that any medical expenses

incurred by claimant as a result of a June 14, 2012, Salina Regional Health Center emergency room visit be paid as authorized medical benefits; (4) denied respondent's requests to (a) exclude Dr. Pedro A. Murati's November 19, 2012, report and testimony and (b) assess court reporter fees against claimant; and (5) ordered that Dr. Ali B. Manguoglu is authorized to continue to provide medical treatment for claimant.

Respondent contends Dr. Murati's opinions are inadmissible as the doctor's report was not provided to respondent within 15 days after his November 19, 2012, examination of claimant and that the plain language of the related statute, K.S.A. 44-515, should be followed. Respondent also maintains claimant failed to prove that his medical problems arising in June 2012, including low back and right leg symptoms, are related to his February 2011 accident. Respondent further submits that the ALJ's determination that the medical bills associated with the new symptoms and problems arising in 2012 should be paid as authorized medical benefits is erroneous.

Whether claimant suffered a permanent injury as the result of the February 2011 accident is also an issue raised by respondent. Further, respondent contends claimant has not proven entitlement to future medical compensation.

Claimant argues Dr. Murati's testimony and November 2012 report are admissible. Claimant requests the Board affirm the ALJ.

The issues before the Board on this appeal are:

1. What injuries did claimant sustain as the result of his February 12, 2011, accident that arose out of and in the course of his employment with respondent? Specifically, were claimant's low back and right leg injuries the result of a June 2012 incident as alleged by respondent and, therefore, not the natural and probable consequence of claimant's injuries sustained on February 12, 2011?

2. Should respondent be required to pay claimant's medical expenses incurred as a result of a June 14, 2012, emergency room visit at Salina Regional Health Center as authorized medical expenses?

3. Should Dr. Murati's November 19, 2012, report and testimony have been admitted into the record?

4. Did the ALJ err by ordering that Dr. Manguoglu be authorized to provide claimant ongoing medical treatment necessary to cure and relieve the effects of his work injury and that future medical treatment will be considered upon proper application?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

The ALJ's Award sets out findings of fact that are detailed and accurate and it is not necessary to repeat those findings of fact herein. The Board adopts the ALJ's findings of fact as its own, except as hereinafter noted.

At his May 12, 2011, deposition, claimant testified that as a result of his work accident, he became unconscious, sustained a head laceration, an internal head hemorrhage and injured his neck and low back. Claimant was taken to the Geary Community Hospital and then on to Stormont-Vail Regional Medical Center, where he spent one night. Claimant testified that since the accident he cannot remember things people tell him and has ringing in both ears that will not stop. He did have a prior low back injury and received minimal treatment, but had no prior neck or head injuries. At the regular hearing, claimant testified that since the accident, his head, neck and back continue to hurt.

After his February 2011 accident, claimant was last treated by Dr. Ali B. Manguoglu. Dr. Manguoglu released claimant from treatment on May 16, 2011, with no restrictions. Thereafter, claimant did not seek additional medical treatment for his work-related injuries until June 2012. Claimant testified that in June 2012 he got out of bed and could not move, as "it got to hurting down my [right] leg, like it always does, but it just got worse and worse and worse and worse, as I was going along."<sup>1</sup> The following testimony is significant:

Q. (Mr. Torline) So would you describe your June 2012 low back [and] leg problems as happening suddenly?

A. (Claimant) I have, I got a pain in my back all the time, okay? It goes down my leg. It just got worse that day.<sup>2</sup>

Claimant testified at his September 12, 2012, deposition that when his back pain worsened in June 2012, he went to see Dr. Manguoglu, but he was on vacation. Claimant could not stand the pain and went to the emergency room at Salina Regional Health Center (Salina Regional). At the regular hearing, claimant indicated the bill was around \$400, but a copy of that medical bill was not placed into evidence.

On July 10, 2012, claimant again saw Dr. Manguoglu, who reviewed a new MRI ordered by claimant's family doctor. The 2012 MRI showed a disc protrusion at right L4-5

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<sup>1</sup> Claimant Depo. (Sept. 12, 2012) at 12.

<sup>2</sup> *Id.* at 13.

that was more prominent than in claimant's 2011 MRI, which Dr. Manguoglu indicated was most likely causing claimant's right leg pain. The 2012 MRI also revealed a narrowing of the spinal canal.

On direct examination, it was Dr. Manguoglu's opinion that claimant's medical issues that arose in June 2012 and his medical treatment in 2012 were not causally related to his 2011 accident. However, on cross-examination he testified that he was unaware of claimant sustaining any new injuries after his release in May 2011, and that claimant reported his back condition worsened through normal daily activities, which Dr. Manguoglu regarded as a natural and probable consequence of an injury. Dr. Manguoglu then testified that since claimant had no intervening trauma or accident, his need for medical treatment was within the realm of being causatively related to the original aggravation of claimant's back condition. On re-direct examination, Dr. Manguoglu said it was more probable claimant's onset of acute pain was caused by something that happened before he saw Dr. Manguoglu in 2012 rather than being related to the 2011 injury.

Dr. Manguoglu was asked if claimant would need ongoing medical treatment:

Q. (Mr. Torline) There's the possibility that he [claimant] might need additional or ongoing treatment for the problems [for which] you saw him in 2012?

Would that be true?

A. (Dr. Manguoglu) Right.<sup>3</sup>

During Dr. Pedro A. Murati's deposition, the following objection was raised by respondent:

Q. (Mr. Albin) Okay. As of November 19th, 2012, what did Mr. Lambert relate to you to be his chief complaints?

Mr. Torline: At this point I would like to raise an objection on medical hearsay grounds as well as 44-515. You may answer.<sup>4</sup>

Respondent argued that pursuant to K.S.A. 44-515, it had requested copies of any and all medical records, but claimant had failed to provide a copy of Dr. Murati's November 19, 2012, report within 15 days after examining claimant. ALJ Sanders disagreed, stating:

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<sup>3</sup> Manguoglu Depo. at 12.

<sup>4</sup> Murati Depo. at 24.

A reasonable reading and interpretation of **K.S.A. 44-515(a) and (b)** is that each party shall provide any medical reports to the opposing party within a time frame that is a reasonable amount of time for the opposing party to rebut the evidence presented in the opposing party's medical report.

In this case there is no evidence that Respondent suffered from an inability to rebut the contents of Dr. Murati's report of November 19, 2012. Claimant's attorney forwarded the report to Respondent's attorney as soon as he received it.

If Respondent wants to persist in a strict interpretation of **K.S.A. 44-515** then he does not have grounds on which to object to Dr. Murati's testimony because there is no specific request made by Respondent for the November 19, 2012 report. There are general requests to provide medical reports and other documents but not a specific request. Further it shall be noted that Respondent's expert Dr. Fevurly's report was not provided to Claimant's attorney within fifteen days of the examination. So a strict interpretation of **K.S.A. 44-515** would also exclude Dr. Fevurly's report.<sup>5</sup>

#### **PRINCIPLES OF LAW AND ANALYSIS**

What injuries did claimant sustain as the result of his February 12, 2011, accident that arose out of and in the course of his employment with respondent?

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.<sup>6</sup> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."<sup>7</sup>

ALJ Sanders found:

In this case it is uncontroverted *[sic]* that Claimant had a motor vehicle accident that involved at the very least a concussion. Also Claimant had, after this accident, persistent neck and low back pain. Claimant did have degenerative disc disease in his spine that was aggravated by this roll over accident. The worsening of Claimant's low back pain with pain going into his right leg *[sic]* is the natural and

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<sup>5</sup> ALJ Award at 10.

<sup>6</sup> K.S.A. 2010 Supp. 44-501(a).

<sup>7</sup> K.S.A. 2010 Supp. 44-508(g).

probable consequence of Claimant's accident. There is no evidence of any intervening trauma or accident. . . .<sup>8</sup>

At the regular hearing, respondent admitted claimant sustained personal injuries by accident arising out of and in the course of his employment with respondent, but asserted claimant's injuries were only temporary. At oral argument respondent indicated that it would not dispute the ALJ's finding that claimant sustained a 16% whole body functional impairment.

Three of the four physicians who testified in this claim opined claimant had a permanent functional impairment: (1) Dr. Chris D. Fevurly gave a 5% whole person functional impairment for problems with cognition and headaches; (2) Dr. Paul S. Stein gave a 16% whole person functional impairment for claimant's loss of memory and cognitive function and lumbosacral and cervicothoracic spinal impairments; and (3) Dr. Murati gave a 27% whole person functional impairment for claimant's post-concussion syndrome, bilateral tinnitus, decrease in audibility/speech impediment and lumbosacral and cervicothoracic spinal impairments.

The Board agrees with ALJ Sanders that, "The best indication of the nature and extent of Claimant's impairment is the opinion given by Dr. Stein."<sup>9</sup>

Dr. Stein indicated claimant's complaint of symptoms was consistent with the mechanism of injury he described. Dr. Fevurly testified that claimant suffered a concussion as a result of the February 2011 accident and has mild residual cognitive and emotional difficulties. The Board finds, based upon the opinions of Drs. Stein and Fevurly, that claimant sustained a permanent impairment as a result of the February 2011 truck accident. The Board finds that Dr. Murati's opinions are not credible as he is the only physician who opined claimant has a permanent impairment for bilateral tinnitus and decrease in audibility/speech impediment. The functional impairment for bilateral tinnitus appears to be based solely on claimant's complaint of ringing in both ears. Dr. Murati performed no testing, nor did he rely on tests of other medical providers, to determine if claimant had permanent auditory and speech impairments. Dr. Murati testified that he had claimant read a paragraph and claimant did not read the paragraph loudly enough. Based upon that fact, Dr. Murati determined claimant had a permanent functional impairment.

Moreover, Dr. Murati's reports indicated that he only reviewed claimant's medical records related to the February 12, 2011, accident and subsequent thereto. Dr. Murati testified that claimant denied any significant prior neck or back injuries. Yet, Dr. Stein's report indicated claimant had prior back injuries in 1994, 1998 and 2005.

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<sup>8</sup> ALJ Award at 8.

<sup>9</sup> *Id.* at 11.

Should respondent be required to pay claimant's medical expenses incurred as a result of the June 14, 2012, emergency room visit at Salina Regional Health Center as authorized medical expenses?

Claimant testified at his September 12, 2012, deposition that on the day in June 2012 that his back got worse, he went to see Dr. Manguoglu, but he was on vacation. Claimant could not stand the pain and went to the emergency room at Salina Regional. At the regular hearing, claimant indicated the bill was around \$400, but a copy of that medical bill was not placed into evidence. ALJ Sanders ordered that claimant's medical expense for his June 14, 2012, visit to the Salina Regional emergency room be paid as an authorized medical expense. Respondent argues the ALJ erred as: (1) the medical bill was a result of claimant's June 2012 injury, not the February 12, 2011, injury; (2) a copy of the medical bill was not placed into evidence; and (3) claimant did not attempt to obtain, nor received authorization from respondent or its insurance carrier to obtain treatment.

Dr. Manguoglu, the only physician who treated claimant before and after the June 2012 incident, equivocated as to whether claimant sustained any new injuries as a result of the June 2012 incident. However, the Board is persuaded by Dr. Manguoglu's testimony that he was unaware of any new injuries that claimant sustained after his release in May 2011. Additionally, the doctor testified that claimant reported his back condition worsened through normal daily activities, which Dr. Manguoglu regarded as a natural and probable consequence of an injury. Further, claimant testified that every day since his February 2011 accident, he had pain in his back, into his right leg and it happened to get worse in June 2012. Therefore, the Board finds the medical expense incurred by claimant at Salina Regional following the June 2012 incident was a natural and probable consequence of claimant's February 2011 back injury.

However, the Board's analysis does not end there, as respondent asserted claimant's medical treatment at Salina Regional was unauthorized. In *Thompson*,<sup>10</sup> claimant twice went to the emergency room when the doctors' offices were closed. The ALJ found the visits were unauthorized, but the Board found the respondent should pay for the emergency room visits because claimant's testimony established a medical emergency. The Kansas Court of Appeals determined claimant's emergency room visits were unauthorized and respondent should be liable for only \$500 of the emergency room expenses under K.S.A. 2010 Supp. 44-510h(b)(2), stating:

Here, however, Thompson was provided with health care by her employer. Thompson has made no allegations that the health care provided by her employer was inadequate. The Act makes no other provision for emergency treatment other than to charge the first \$500 of such treatment to the employer under K.S.A. 2010 Supp. 44-510h(b)(2). Consequently, the Board erred, as a matter of law, in

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<sup>10</sup> *Thompson v. Hasty Awards, Inc.*, No. 106,359, 2012 WL 1970241 (Kansas Court of Appeals unpublished opinion filed May 25, 2012).

authorizing compensation for the unauthorized hospital bill in excess of the \$500 limit provided by K.S.A. 2010 Supp. 44-510h(b)(2).

The Board has since followed the precedent set by *Thompson* in *Dinwiddie*<sup>11</sup> and *Lemmons*.<sup>12</sup> No evidence was presented that claimant contacted respondent or its insurance carrier for authorization to receive medical treatment. Moreover, claimant failed to introduce a copy of the medical bill he owed to Salina Regional. Therefore, the Board reverses the ALJ on this issue and finds that claimant's treatment at Salina Regional was not an authorized medical expense.

Should Dr. Murati's November 19, 2012, report and testimony have been admitted into the record?

The Board finds that it is unnecessary to decide this issue, as it did not rely on Dr. Murati's opinions to decide any of the other issues herein. Specifically, the Board found that Dr. Murati's opinions on claimant's permanent functional impairment were not credible, and instead relied on the opinions of Dr. Stein.

Did the ALJ err by ordering that Dr. Manguoglu be authorized to provide claimant medical treatment necessary to cure and relieve the effects of his work injury and that future medical treatment will be considered upon proper application?

The ALJ ordered that Dr. Manguoglu was authorized to provide claimant with medical treatment necessary to cure and relieve the effects of the injury. Dr. Manguoglu testified claimant might need ongoing medical treatment. The Board finds there is sufficient evidence that claimant would need ongoing medical treatment. Dr. Manguoglu is an experienced physician who previously determined claimant was at maximum medical improvement and had no restrictions. Dr. Manguoglu is capable of determining what, if any, ongoing medical treatment claimant needs. Therefore, the Board will not disturb that part of ALJ Sanders' Award that authorized Dr. Manguoglu to provide claimant with medical treatment necessary to cure and relieve the effects of the injury.

ALJ Sanders ruled that future medical treatment will be considered upon proper application. Respondent argues that only Dr. Murati opined claimant will need future medical treatment and if Dr. Murati's testimony and November 19, 2012, report are stricken

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<sup>11</sup> *Dinwiddie v. City of Wichita*, No. 1,054,309, 2013 WL 485702 (Kan. WCAB Jan. 28, 2013).

<sup>12</sup> *Lemmons v. Ryder Integrated Logistics, Inc.*, No. 1,036,335, 2012 WL 3279490 (Kan. WCAB July 31, 2012).

from the record, there is no evidence that claimant is in need of future medical treatment. In *Parker-Rouse*,<sup>13</sup> the Kansas Court of Appeals stated:

At the time of Amy's injury, the law stated that a claimant maintained a right to future medical benefits even when there was no evidence of a continuing need. See *Ferrell v. Day & Zimmerman, Inc.*, 223 Kan. 421, 423, 573 P.2d 1065 (1978); *Boucher v. Peerless Products, Inc.*, 21 Kan. App. 2d 977, 983, 911 P.2d 198, rev. denied 260 Kan. 991 (1996).

Though K.S.A. 2011 Supp. 44-510h(e), enacted in 2011, predicates the right to claim future medical benefits upon a showing that "it is more probably true than not true that additional medical treatment will be necessary" after a claimant reaches maximum medical improvement, this 2011 legislative change is prospective rather than retroactive in application and does not apply to Amy's case. See *Matney v. Matney Chiropractic Clinic*, 268 Kan. 336, 339, 995 P.2d 871 (2000).

Pursuant to *Parker-Rouse*, the Board affirms the ALJ's finding that upon proper application to the Director of Workers Compensation, future medical benefits will be considered. In arriving at this finding, the Board found it unnecessary to consider the opinion of Dr. Murati that claimant will need future medical treatment.

### CONCLUSION

1. Claimant has a 16% whole body functional impairment. His injuries resulted from his February 12, 2011, accident that arose out of and in the course of his employment with respondent and were not the result of a June 2012 incident as alleged by respondent.

2. Claimant's medical expenses incurred at Salina Regional as a result of the June 14, 2012, emergency room visit were not authorized medical expenses. However, respondent is liable for up to \$500 for any unauthorized medical expense claimant incurred.

3. The Board finds that it is unnecessary to determine if Dr. Murati's November 19, 2012, report and testimony should be excluded from the record.

4. Claimant is entitled to ongoing medical treatment by Dr. Manguoglu and future medical benefits upon proper application to and approval by the Director of Workers Compensation.

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<sup>13</sup> *Parker-Rouse v. Larned Healthcare Center*, No. 107,221, 2012 WL 5392155 (Kansas Court of Appeals unpublished opinion filed Nov. 2, 2012).

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>14</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

**AWARD**

**WHEREFORE**, the Board reverses that part of the March 11, 2013, Award entered by ALJ Sanders that found claimant's medical expenses incurred as a result of the June 14, 2012, emergency room visit at Salina Regional Health Center were authorized medical expenses. Respondent is liable for up to \$500 for any unauthorized medical expense claimant incurred. The Board finds it unnecessary to address the issue of whether Dr. Murati's November 19, 2012, report and testimony should be excluded from the record. The Board affirms the Award of ALJ Sanders in all other respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August, 2013.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: R. Todd King and Gary K. Albin, Attorney for Claimant  
tking@kbafirm.com; galbin@kbafirm.com; trod@kbafirm.com

Terry J. Torline, Attorney for Respondent and its Insurance Carrier  
tjtorline@martinpringle.com; dltweedy@martinpringle.com

Rebecca A. Sanders, Administrative Law Judge

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<sup>14</sup> K.S.A. 2012 Supp. 44-555c(k).